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No. 94-1287

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

PHILLIPS PETROLEUM COMPANY,
Petitioner,
v.
GARY JOHNSON, AREA MANAGER,
DALLAS AREA COMPLIANCE OFFICE,
MINERALS MANAGEMENT SERVICE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONER

G.W. FRICK
DAVID T. DEAL
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005

THOMAS J. EASTMENT
Counsel of Record
KELLY A. RILEY
BAKER & BOTTS, L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Amicus Curiae
American Petroleum Institute

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF AMICUS CURIAE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONER

The American Petroleum Institute ("API") respectfully files this brief of *amicus curiae* in support of the Petition for Writ of Certiorari filed by Phillips Petroleum Company ("Phillips Petition"). All parties to this action have consented to the API's filing of an *amicus* brief. Their letters of consent have been filed with the Clerk of the Court concurrently with this brief.

STATEMENT OF INTEREST

API is a trade association located in the District of Columbia, representing the interests of its membership on issues of national import before federal government agen-

cies, Congress, and the courts. API has over 300 members from all segments of the oil and gas industry, including many integrated and independent oil and gas producers. These producer-members hold interests in thousands of oil and gas leases on federal onshore lands and submerged lands in the Outer Continental Shelf ("OCS"), and have a critical interest in the resolution of the issue presented in the Phillips Petition.

The issue raised in the Phillips Petition pertains to the applicability of the six-year limitations period in 28 U.S.C. § 2415(a) for actions brought by the United States for monies allegedly due under contracts with the federal government. This question is of great importance to the members of API by reason of their interests in federal oil and gas leases, under which these companies pay royalties to the federal government.

The Fifth Circuit's decision below, which holds that 28 U.S.C. § 2415(a) does not apply to actions brought by the United States for royalties allegedly due under federal oil and gas leases, directly conflicts with decisions of the Tenth Circuit. Insofar as the Fifth Circuit's decision leaves API's members exposed to suits for additional royalties in perpetuity, API has a substantial interest in the issue presented by Phillips.

SUMMARY OF ARGUMENT

API strongly supports the Phillips Petition. The importance of the issue presented transcends the interests of the parties to the proceedings below. Because the issue is of fundamental importance to the entire oil and gas industry, as well as to others having contractual relationships with the federal government, API urges the Court to grant a writ of certiorari.

The case addresses the scope of the general six-year period of limitations applicable to contract actions brought by the United States. 28 U.S.C. § 2415(a). Specifically, the question presented is whether the Fifth

Circuit erred in holding that the statutory provision bars neither judicial nor administrative actions brought by the United States for monies allegedly due under contracts. By eliminating the applicability of any limitations period to such actions, the Fifth Circuit's decision upsets the level playing field Congress created in contract matters between the federal government and private parties. In Section 2415(a), Congress intended to provide the federal government with the same six-year period in which to bring contract actions for money as provided to private parties to bring such actions against the federal government pursuant to 28 U.S.C. § 2401(a). *See, e.g., Crown Coat Front Co. v. United States*, 386 U.S. 503, 521 n.14 (1967).

The Fifth Circuit's decision exposes lessees in perpetuity to actions based on alleged royalty underpayments with respect to the over $3 billion of royalty payments made each year under the approximately 25,000 federal and Indian oil and gas leases currently extant. *See* U.S. Department of the Interior, Minerals Management Service, *Mineral Revenues 1993: Report on Receipts from Federal and Indian Leases* 13, 97 ("Mineral Revenues 1993"). Moreover, inasmuch as 28 U.S.C. § 2415(a) is generally applicable to contract actions brought by the United States, the impact of the decision will necessarily extend well beyond oil and gas lease disputes.

The impact of the decision is aggravated by the conflict between the Fifth Circuit's decision and recent decisions of the Tenth Circuit and other Courts of Appeals. *See Phillips Petroleum Co. v. Lujan*, 4 F.3d 858 (10th Cir. 1993) ("*Phillips I*"); *Mesa Operating Ltd. Partnership v. Department of the Interior*, 17 F.3d 1288 (10th Cir. 1994). In contrast with the Fifth Circuit's decision, the Tenth Circuit held in *Phillips I* and *Mesa* that 28 U.S.C. § 2415(a) establishes a limitations period on actions brought by the United States for monies purportedly due

under oil and gas leases. The Fifth Circuit's view also conflicts with numerous decisions of other Courts of Appeals that have applied Section 2415(a) to actions by the United States to recover money due under contracts other than oil and gas leases. As a result, the applicability of the six-year limitations period is now a matter of whether the United States brings an action for allegedly owed royalties in the Fifth Circuit or another Court of Appeals. Until reconciled, the conflict will result in substantial unfairness and uncertainty with respect to such actions.

In API's view, the plain terms of 28 U.S.C. § 2415(a) specify that the six-year limitations period applies to actions for monies due under a contract. In the context of actions in contract, the term "money damages" is widely understood to encompass monies due under a contract. The contrary view adopted by the Fifth Circuit improperly equates such an action with one for specific performance, and in so doing essentially eviscerates the statute with respect to a large and critical category of contract actions for the recovery of money.

For these reasons, the Court should grant a writ of certiorari to resolve the conflict between the decisions of the Fifth Circuit and the Tenth Circuit and other Courts of Appeals, and to ensure that the general six-year statute of limitations for actions brought by the United States under contract is applied as intended by Congress.

REASONS FOR GRANTING THE PETITION

I. THE ISSUE PRESENTED IS OF SUBSTANTIAL IMPORTANCE AND SHOULD BE RESOLVED BY THE COURT.

The issue presented in the Phillips Petition is of substantial importance not only to federal oil and gas lessees but also to all those entering into contracts with the federal government. The statute interpreted in the Fifth Circuit's decision sets forth the general limitations period

governing contract actions for money damages brought by the United States. The Fifth Circuit's decision, however, eviscerates the statute by excluding from its reach all actions for monies allegedly due to the federal government under contract.

1. The effective elimination of a general limitations period for actions for monies due under a contract with the federal government has a substantial and detrimental impact on parties contracting with the federal government. API's members, which include many integrated and independent oil and gas producers, are among those impacted by the Fifth Circuit's decision. API's members and other oil and gas producers are currently lessees under over 25,000 federal and Indian oil and gas leases affecting both onshore lands and submerged lands in the Outer Continental Shelf. Mineral Revenues 1993, *supra*, at 97. Under these leases, over $3 billion in royalties was paid to the federal government in calendar year 1993. *Id.* at 13. The effect of the Fifth Circuit's decision is to leave open in perpetuity these producer-lessees to actions brought by the United States based on contractual claims that royalties were underpaid. Stale claims, which can be brought an unlimited number of years after royalties are allegedly due, can generate sizeable additional claims for interest that can cause a substantial and unanticipated impact on cash flow. *See* 30 U.S.C. § 1721(a) (royalty interest). Such unanticipated liabilities are particularly disruptive to smaller companies.

2. The Fifth Circuit's position on the reach of 28 U.S.C. § 2415(a) is of paramount importance to the oil and gas industry. Many oil and gas producers have their principal places of business within the Fifth Circuit. In addition, well over 90 percent of the oil and gas produced from federal offshore leases in 1993 was produced off the coast of states within the jurisdiction of the Fifth Circuit. Mineral Revenues 1993, *supra*, at 33-37. And offshore production accounted for about 79 percent of

the oil and gas royalty revenue from all federal and Indian lessees. *Id.* at 13. Accordingly, a substantial portion of actions brought by the United States for underpaid royalties will likely arise in the district courts within the Fifth Circuit.

3. The conflict between the Fifth Circuit and the Tenth Circuit will cause considerable confusion and unfairness. The Tenth Circuit comprises states in which a substantial majority of federal onshore oil and gas leases are located. Mineral Revenues 1993, *supra*, at 96. Given the contrasting views of the Fifth and Tenth Circuits, the United States will likely select a forum for its contract actions against lessees in the Fifth Circuit whenever possible to avoid the Tenth Circuit. Of course, venue requirements may force the United States to bring some cases to the Tenth Circuit, or lessees may attempt to bring declaratory judgment actions within the Tenth Circuit, as the lessee did in *Phillips I*. The result will be intolerable inconsistency. When before a court in the Fifth Circuit, lessees will be exposed to claims for underpaid royalties in perpetuity. When before a court in the Tenth Circuit, 28 U.S.C. § 2415(a) will interpose the protection of a six-year limitations period. The Supreme Court should resolve this conflict to minimize the incentive for forum shopping and to ensure that all federal lessees, wherever located, are provided equal protection under applicable statutes.

4. Finally, resolution of the conflict between the Fifth and Tenth Circuits is of pressing importance given the rapidly changing regulatory environment confronting the gas industry. Neither the federal government nor the gas industry is served by the absence of a limitations period on claims for additional royalties during this period of dramatic industry change.

a. There is no question that the existence of an applicable limitations period serves to provide a significant

incentive to the federal government to audit lessee royalty payments and to bring actions for alleged underpayments in a prompt and timely manner. Indeed, prior to its change of position in the case below before the Fifth Circuit, the United States Department of the Interior ("DOI") took the position that 28 U.S.C. § 2415(a) applied to its claims for additional royalties. *See, e.g., Phillips I*, 4 F.3d at 860 ("The [Secretary of the Interior] agree[s] that 28 U.S.C. § 2415(a) is the applicable statute for determining when the government must commence its action to collect the royalty underpayment."). *See also* DOI Memorandum, dated May 10, 1974, App., *infra*, at 2a ("It is clear that the statute applies to suits by the government to collect rents and royalties."). This led the Department to caution its auditors to audit lessee royalty payments promptly so as to avoid the statutory bar to claims. *See* App., *infra*, at 7a-8a. Although the Department adopted an unjustifiably liberal view of when the limitations period would run, *see, e.g., Phillips I*, 4 F.3d at 860, the existence of some limitations period provided an incentive to the Department to undertake prompt action to identify royalty underpayments and to seek redress. The effect of the Fifth Circuit's decision is to reduce the agency's incentive to undertake promptly its actions for royalty underpayments.

b. The likely impact of the Fifth Circuit's decision on the promptness of agency action is particularly counterproductive given the rapid changes occurring in the gas industry. The federal government's audit and enforcement activities provide important guidance to lessees as to the government's position on emerging issues and, concomitantly, enable the government to adapt its policies to industry changes. For this reason, the rapidly changing gas industry makes it essential for the federal government to audit on a timely basis and to assert promptly its claims for additional royalties.

Prior to 1978, producers' gas prices were regulated by the Federal Power Commission under the Natural Gas Act. 15 U.S.C. §§ 717 *et seq.* During this era, the vast bulk of gas sold in interstate commerce was sold by producers to pipelines for sale to end-users or for resale to local distribution companies. This structure continued for several years under the Natural Gas Policy Act of 1978 ("NGPA"), which established separate price ceilings for numerous categories of gas.[1] During this era, the substantial majority of gas was sold at the wellhead for the applicable ceiling price. Inasmuch as federal royalties are tied to the value of gas produced and sold, the amount of royalty due was largely a function of the applicable regulatory ceilings.

But in the NGPA were planted the seeds of rapid and radical change. The NGPA removed ceiling prices on many categories of gas on a specified schedule. 15 U.S.C. § 3331 (repealed 1989) (West Supp. 1994). This process, which left regulated essentially only "old" gas that had been previously regulated under the Natural Gas Act, was brought full circle in the Decontrol Act of 1989, which eliminated all remaining price ceilings as of January 1, 1993. *See* 15 U.S.C. §§ 3311-3319, 3331 (repealed 1989) (West Supp. 1994).

The deregulation of wellhead gas prices forced rapid changes in the overall regulatory environment for the gas industry. In order to spread the competitive benefits of deregulation, the Federal Energy Regulatory Commission embarked on an effort to provide gas purchasers greater access to alternative suppliers. In its Order No. 436, issued on October 9, 1985, the Commission instituted a transportation program that was designed to encourage interstate pipelines to provide transportation

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[1] *See* 15 U.S.C. §§ 3311-3319, *repealed by* Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, § 2(b), 103 Stat. 158 ("Decontrol Act of 1989").

services on an open access basis.[2] Subsequently, in Order No. 636, issued on April 8, 1992, the Commission went further and required interstate pipelines to sever the tie between their sales and transportation services.[3]

The result is a complete change in the industry structure. No longer is gas generally sold in interstate commerce at the wellhead at regulated prices, which generally provided the basis for royalty payments. New innovative gas transactions have replaced the relatively simple producer/interstate pipeline gas sales contracts, completely new gas marketing entities have arisen as resellers between the producer and downstream purchasers, and the industry engages in futures trading and other innovative activities reflective of a free and competitive market. These changes, which dramatically complicate the determination of the value received for gas by a producer/lessee, in turn affect the amount of royalties owed to the federal government.

It is API's view that in such a rapidly changing environment, neither the federal government nor industry is served by allowing the federal government an unlimited time in which to bring claims for additional royalties. The resources of both the government and industry would be now far better deployed in working on the issues raised by the new complex gas marketplace, rather than litigating today the regulatory problems of a past decade.

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[2] For a discussion of the changes brought about in the gas industry by Order No. 436, see *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied sub nom. Interstate Natural Gas Ass'n of Am. v. FERC*, 485 U.S. 1006 (1988).

[3] *See* Order No. 636, III F.E.R.C. Stats. & Regs. [Regs. Preambles] ¶ 30,939 (1992), *reh'g denied in part and granted in part*, Order No. 636-A, III F.E.R.C. Stats. & Regs. [Regs. Preambles] ¶ 30,950 (1992), *reh'g denied*, Order No. 636-B, 61 F.E.R.C. ¶ 61,272 (1992), *reh'g denied*, 62 F.E.R.C. ¶ 61,007 (1993), *appeal redocketed sub nom. United Distribution Cos. v. FERC*, No. 92-1485 (D.C. Cir. Feb. 8, 1995).

Prompt prosecution of claims will yield the federal government the royalty that it is due on a more timely basis and provide industry with a more timely understanding of the federal government's position on issues affecting the amount of royalty due.

For these reasons, the Court should grant a writ of certiorari because the resolution of the issue presented is of substantial and continuing importance to a large number of oil and gas lessees as well as to other government contractors.

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

1. The Fifth Circuit's decision directly conflicts with two decisions by the Tenth Circuit on the issue of whether the six-year statute of limitations in 28 U.S.C. § 2415(a) applies to actions brought by the Minerals Management Service ("MMS") to collect allegedly underpaid royalties on mineral leases. The Fifth Circuit held that Section 2415(a) does not apply to actions brought by the MMS to collect additional royalties. Phillips App. at 3a-4a. The Tenth Circuit, however, has found in two separate decisions that Section 2415(a) does apply to such actions. *Mesa*, 17 F.3d at 1291; *Phillips I*, 4 F.3d at 860 n.1. Because the Fifth and Tenth Circuits, in which many producers have their principal places of business and where a substantial majority of federal oil and gas leases are located, are the primary forums for suits involving federal oil and gas leases, prompt resolution of the conflict between these Courts of Appeals is necessary.

a. There were two bases underlying the Fifth Circuit's decision that Section 2415(a) does not apply in this case. First, the Fifth Circuit determined that the term "action for money damages" in Section 2415(a) "refers to a suit in court." Phillips App. at 3a. Making no

explicit reference to the agency's counterclaim, the Fifth Circuit held that Section 2415(a) did not apply to the administrative orders to pay issued by the MMS, because the agency's orders "do not involve the filing of a complaint." *Id.* Second, the Fifth Circuit held that Section 2415(a) did not apply because the MMS orders did not seek "money damages." *Id.* at 4a. Relying on this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Fifth Circuit narrowly construed the phrase "money damages" in Section 2415(a) as referring only to a "sum of money used as compensatory relief." Phillips App. at 4a. The court found that the relief requested in the MMS orders was not compensatory, because the orders only sought money due under a contract with the government. *Id.*

Although the Fifth Circuit's decision states that "[a]gency orders are . . . not barred by the limitations period of § 2415," its holding also exempts judicial actions by the government from the time limitations in Section 2415(a). Under the Fifth Circuit's holding if the MMS files a complaint or counterclaim in court to collect underpaid royalties, Section 2415(a) would not apply because the action would not constitute an action for "money damages." Indeed, notwithstanding Section 2415(a)'s time limitation, the Fifth Circuit affirmed the district court's decision to permit the MMS to file a counterclaim against Phillips to enforce its administrative orders to collect allegedly underpaid royalties. Phillips App. at 4a, 9a.

b. Directly contrary to the Fifth Circuit's decision, the Tenth Circuit has found that Section 2415(a) applies to actions brought by the MMS for royalty underpayments. *Mesa*, 17 F.3d at 1291; *Phillips I*, 4 F.3d at 860 n.1. In *Mesa*, the Tenth Circuit determined that the statute of limitations in Section 2415(a) was a valid defense to the

federal government's action to collect underpaid royalties pursuant to a mineral lease. 17 F.3d at 1291. Although the court declined to apply the statute, because it found that the lessee's failure to raise the defense in a timely manner constituted a waiver, the court's analysis makes clear that in order to collect underpaid royalties, the government must bring an action before the six-year statute has run. *Id.* at 1291-92.

In *Phillips I*, the Tenth Circuit held that Section 2415(a) is the "controlling statute of limitations" for determining when the government must commence actions for collection of alleged royalty underpayments. 4 F.3d at 860 n.1. At issue in that case was the date from which the six-year limitations period began to run, and whether such period was tolled until the government completed its audit of the lessee. *Id.* at 860-62. The necessary predicate for the Tenth Circuit's resolution of those issues was the court's determination that Section 2415(a) imposed a time limitation on the federal government to commence an action to collect underpaid royalties. Significantly, the *Phillips I* court only remanded the case to the district court to make the necessary factual findings to determine *when* the statute of limitations began to run against the government. *Id.* at 864.

2. The Fifth Circuit's conclusion that an action based on the contractual obligation to pay money is not an "action for money damages" also conflicts with numerous decisions of other Courts of Appeals interpreting Section 2415(a) outside the context of oil and gas leases. The Eighth, Ninth, Tenth, Eleventh and D.C. Circuits have uniformly applied the six-year statute of limitations in Section 2415(a) to actions by the United States to recover monies due under a contract. *See, e.g., United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1490 (9th Cir. 1993) (suit to recover deficiency debt, arising from contract, "is 'an action for money damages founded upon a contract' subject to the six-year limitations period pro-

vided in 28 U.S.C. § 2415(a)"); *United States v. Alvarado*, 5 F.3d 1425, 1428 (11th Cir. 1993) (applying Section 2415(a) to action seeking to recover deficiency on promissory note); *United States v. Gottlieb*, 948 F.2d 1128, 1128-29 (9th Cir. 1991) (applying Section 2415(a) to action by Small Business Administration to enforce payment by guarantor on student loan); *FDIC v. Bachman*, 894 F.2d 1233, 1237 (10th Cir. 1990) (applying Section 2415(a) to claims by FDIC "to enforce notes, guaranties, or other contracts"); *United States v. Vanornum*, 912 F.2d 1023, 1025 (8th Cir. 1990) (applying Section 2415(a) to action to enforce loan guaranties); *United States v. Rollinson*, 866 F.2d 1463, 1465 (D.C. Cir.), *cert. denied*, 493 U.S. 818 (1989) (same).

This Court should grant the Phillips Petition in order to resolve the conflict between the decisions of the Fifth and Tenth Circuits regarding the time limits on the right of the United States to collect allegedly underpaid royalties under oil and gas leases. In addition, this Court should grant the Phillips Petition to resolve the conflict between the decisions of the Fifth Circuit and the decisions of other Courts of Appeals with respect to the application of Section 2415(a) to actions by the United States to recover monies due under other types of contracts with the United States.

III. THE FIFTH CIRCUIT ERRED IN HOLDING SECTION 2415(a) INAPPLICABLE.

1. The Fifth Circuit's holding that Section 2415(a) does not apply to limit the time when the federal government may bring either an administrative or a judicial action for collection of underpaid royalties not only conflicts with the Tenth Circuit, it is incompatible with the plain language of Section 2415(a) and its legislative history. The plain language of Section 2415(a) and the legislative history demonstrate that Congress intended

for Section 2415(a) to limit the government's recovery of stale royalty claims. Phillips Petition at 18-19.

Phillips' primary position, is that Section 2415(a) requires the MMS to file a judicial action for underpaid royalties within the applicable six-year period. Phillips Petition at 18. In the alternative, Phillips argues that Section 2415(a) requires MMS at a minimum to issue an administrative order for payment within this period. Phillips Petition at 19. Regardless of whether Section 2415(a) is held to apply only to judicial actions or also to administrative actions,[4] the Fifth Circuit erred in holding that Section 2415(a) applies to neither type of action.

2. In its Petition, Phillips ably explains why the Fifth Circuit's decision is entirely inconsistent with the language and purpose of Secton 2415(a). API therefore only supplements the Phillips Petition with a few brief points.

a. The Fifth Circuit's reliance on *Bowen* to define the term "money damages" in Section 2415(a) extends the reach of that decision far beyond its reasonable scope. In *Bowen*, the State of Massachusetts brought suit for declaratory and injunctive relief against the Department of Health and Human Services to enforce a statute, which provides that the Department shall reimburse states for certain Medicaid services. 487 U.S. at 887-88. The issue was whether the action should have been brought in district court or the United States Court of Federal Claims. *Id.* at 890-91. The Court held that the suit was properly brought in the district court because it was not one for "money damages," as that term is used in Section 702

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[4] *Cf. 3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) ("Given the reasons why we have statutes of limitations, there is no discernible rationale for applying" a limitation when an "action or proceeding is brought in a court, but not when it is brought in an administrative agency.").

of the Administrative Procedure Act, 5 U.S.C. § 702 ("APA").[5]

Bowen is distinguishable from this case where the government seeks to recover damages for breach of a *contract* to pay royalties, and where the issue is the applicability of a statute of limitations as a bar to the action. As this Court recognized, the state's suit in *Bowen* to enforce the statute "is not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." 487 U.S. at 900. In contrast, an action to recover allegedly underpaid royalties seeks *compensation* for breach of the lessee's obligation under the contract to pay royalties for the amount of minerals removed by the lessee. Such actions also typically seek compensation in the form of interest for the loss of the time value of the royalties allegedly due. *See* Phillips App. at 92a-94a; 30 U.S.C. § 1721(a).

Thus, *Bowen* should not be applied in contract actions to interpret the meaning of "money damages" in Section 2415(a).[6] To do so would contravene the otherwise uni-

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[5] 487 U.S. at 891-903. Section 702 of the APA provides jurisdiction to the district courts to hear actions against federal agencies "seeking relief other than money damages." 5 U.S.C. § 702.

[6] *See Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1513 (9th Cir. 1994) ("Although the Court's discussion [in *Bowen*] of the differences between monetary and specific relief was quite lengthy, it was within the context of the APA and should not be treated as a widely applicable, general rule for determination of the nature of the relief sought."). *See also North Star Alaska v. United States*, 9 F.3d 1430, 1432 (9th Cir. 1993) (*Bowen* inapplicable to determine district court's jurisdiction over suit on lease with Government because *Bowen* "was not a contract case."); *TransOhio Sav. Bank v. OTS*, 967 F.2d 598, 613 (D.C. Cir. 1992) ("[A]lthough *Bowen* invites us to reject our prior holdings, it does

form position taken by other Courts of Appeals in numerous decisions that Section 2415(a) applies to contract actions by the United States to recover money due under the contract. *See* Part II.2, *supra*.

b. In reaching its conclusion in *Bowen*, this Court relied on the legislative history of 5 U.S.C. § 702 showing that Congress intended to extend jurisdiction to the district courts over the action before the Court. 487 U.S. at 896-900. A similar inquiry into the legislative history of Section 2415(a) demonstrates that Congress intended the statutory bar to apply broadly to all contract actions for money brought by the federal government and, therefore, did not intend by the use of the term "money damages" to delimit the reach of the statutory limitations period. *See* S. Rep. No. 1328, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2504 ("Subsection (a) of new Section 2415 . . . provides for a 6-year limitation which would apply to *all Government actions based on contracts* whether expressed or implied in law or in fact.") (emphasis added); *id.* ("In all such contract matters, the action would be barred unless it were brought by the Government within 6 years . . . .").

Therefore, the legislative history demonstrates that the reach of Section 2415(a) encompasses *all* contract actions for money, and should not be limited as the Fifth Circuit has done in this case. By exempting all actions to enforce contractual obligations to pay money, the Fifth Circuit has essentially eviscerated the statute.

c. In addition, the Fifth Circuit's decision undermines the equality of treatment in contract matters between the government and private parties that Congress intended to provide in Section 2415(a). *See Crown Coat Front Co. v. United States*, 386 U.S. 503, 521 n.14 (1967)

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not compel us to do so. *Bowen* did not involve a contract . . . ."), *appeal after remand sub nom. Transcapital Fin. Corp. v. Director, OTS*, 44 F.3d 1023 (D.C. Cir. 1995).

("The congressional intent [in Section 2415] to 'put the Government on a parity with those private litigants who may sue' and 'to equalize the position of litigants' is sufficiently evident.") (quoting *Hearing on H.R. 13652 Before the Subcomm. No. 2 of the House Comm. of the Judiciary*, 89th Cong., 2d Sess. 9, 11 (1966)). *See also* S. Rep. No. 1328, *supra*, 1966 U.S.C.C.A.N. at 2503 ("[I]t is only right that the law should provide a period of time within which the Government must bring suit on claims just as it now does as to claims of private individuals."). Indeed, the six-year limitation in Section 2415(a) was intended to correspond to the six-year statute of limitations applicable to civil actions by private parties against the United States set forth in 28 U.S.C. § 2401(a), and to actions against the United States in the U.S. Court of Federal Claims. *Id.* at 2508.

There is no question that actions by private parties against the United States to recover money owed under a contract are subject to the six-year statute of limitations in Section 2401(a). *See, e.g., Crown Coat Front Co.*, 386 U.S. at 510 (government contractor action against United States for adjustment in contract price in form of refund pursuant to "changes clause" in contract, subject to six-year statute of limitations in Section 2401(a)); *Victor Foods, Inc. v. Crossroads Economic Dev. of Charles County, Inc.*, 977 F.2d 1224, 1226 (8th Cir. 1992) (contract claim against Small Business Administration for reimbursement for costs as required by lease dismissed based on Section 2401(a)'s six-year statute of limitations); *Maine State Board of Education v. Cavazos*, 956 F.2d 376, 379 (1st Cir. 1992) (action by Maine Board of Education against Department of Education ("DOE") to recover $1.7 million pursuant to agreement with DOE subject to Section 2401(a)'s statute of limitations); *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 590-91, 597 (9th Cir. 1990) (breach of contract action against United States for monetary relief

subject to six-year statute of limitations in Section 2401(a).

The Fifth Circuit's decision, if not reversed, would remove the six-year limitations period on actions brought by the federal government for money due under a contract. Yet a party bringing a claim against the United States for money owed under a contract would remain subject to the six-year limitations period in 28 U.S.C. § 2401(a). This upsets the parity of treatment between the government and private litigants that Congress intended by enacting Section 2415(a).

CONCLUSION

The Petition for Writ of Certiorari filed by Phillips Petroleum Company should be granted.

Respectfully submitted,

G.W. FRICK
DAVID T. DEAL
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005

THOMAS J. EASTMENT
Counsel of Record
KELLY A. RILEY
BAKER & BOTTS, L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Amicus Curiae
American Petroleum Institute

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